COURT OF APPEALS
DECISION
DATED AND FILED

November 17, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3049-CR **Cir. Ct. No. 02CF000045**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KOVAC KIDD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Kovac Kidd appeals from a judgment of conviction for second-degree sexual assault. He argues on appeal that there was insufficient evidence to convict him of second-degree sexual assault, that the trial court erred when it declined to instruct the jury on fourth-degree sexual assault, and that the trial court erred when it denied his request for access to the victim's psychiatric

records. We conclude that there was sufficient evidence to convict him of second-degree sexual assault, and that the court did not err when it denied his request for the victim's psychiatric records. However, we conclude that the trial court did err when it declined to instruct the jury on fourth-degree sexual assault. Consequently, we reverse the judgment of conviction and remand for a new trial.

¶2 At trial, Kidd was charged with second-degree sexual assault, for assaulting a woman in her apartment. *See* WIS. STAT. § 940.225(2)(a) (2001-02).[1] One element of second-degree sexual assault is that the defendant committed the act "by use or threat of force or violence." WIS JI—CRIMINAL 1208. Kidd first argues that there was insufficient evidence offered at trial to support the force element. We disagree.

¶3 When considering a challenge to the sufficiency of the evidence, this court must affirm "if it finds that the jury, acting reasonably, could have found guilt beyond a reasonable doubt.... [T]he jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

found guilt based on the evidence before it." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

¶4 When we consider whether there was sufficient evidence to establish the force element, we do not view it as a separate and distinct form of conduct; rather, we assess that element as a generalized concept of conduct. ***State v. Baldwin***, 101 Wis. 2d 441, 451, 304 N.W.2d 742 (1981). The facts established at trial were that Kidd knocked on the door to the victim's apartment. She looked through the peephole, recognized Kidd as the nephew of a friend in the building, and opened the door slightly to see what he wanted. Kidd told her he needed to use the telephone but she did not believe him because his uncle lived in the same building. She then attempted to close the door while Kidd tried to push his way in. They struggled with the door and Kidd eventually pushed the door, causing the victim to fall backwards into the bedroom. At the time, Kidd was thirty-two years old and weighed 230 pounds. The victim was fifty years old.

¶5 The victim testified that Kidd looked "wild" and like he was "on something." Kidd told the victim to remove her clothes and she complied because she was afraid that "he could do anything to me and nobody would ever know what happened …." She could not get past him without being hurt. The victim had been told previously that Kidd had sexually assaulted another woman in the building.

¶6 The victim testified that Kidd then smoked some crack cocaine and began touching her breasts and vaginal area, eventually performing cunnilingus on her. The victim testified that she told him "we can do this" because she wanted to calm him down to get him away from her. The victim then told Kidd to lock the door and get her keys. She had a small can of mace attached to her keys. Kidd

gave her the keys and the victim pointed the mace at his face. Kidd fled, and the victim called the police. When the police came, the victim was crying and shaken.

¶7 Kidd argues that the only force he used was to push open the door—in other words, he attempts to isolate his entry into the apartment from the ensuing assault. We do not agree that the two can be separated. Kidd admitted that he went to the victim's apartment to have sex, pushed his way into the apartment as the victim resisted, smoked crack cocaine, and performed cunnilingus on her. Kidd does not dispute that he had sexual contact or intercourse with the victim. For the purposes of the appeal, he concedes that the victim did not consent to the sexual act. Given Kidd's size and age, as well as these other facts, we conclude that the State presented sufficient evidence to establish that he used or threatened force or violence when committing the assault.

¶8 The next issue is whether the trial court erred when it denied Kidd access to the victim's psychiatric records. When Kidd initially moved to have access to these records, the court granted the motion. The State then asked the court to reconsider. The court did, and denied the motion, finding that Kidd had not offered a sufficient specific factual basis demonstrating a reasonable likelihood that the records contained relevant information necessary to a determination of guilt or innocence that was not merely cumulative to other evidence available to the defendant.

¶9 Specifically, the defense offered the affidavit of someone who knew the victim and believed that the victim took medication for psychiatric disorders, and that these drugs affected the victim's truthfulness. A blood sample had been taken from the victim on the night of the incident. The State had this sample analyzed for the presence of medications. A person from the State Crime Lab

testified about those results. The defense then had a psychiatrist testify about the drugs found in the victim's bloodstream, and what effect those drugs have on a person.

¶10 After hearing the testimony, the court denied the motion for an in camera inspection of the victim's records. The court found that the testimony of the person who said that the victim's medication use affected her truthfulness was not the testimony of an expert. The court further found that the testimony did not establish that the victim's perceptions and abilities to convey truthfulness had been in any way distorted at the time of the assault. Further, the court found that the psychiatrist's testimony was not specific to the case. The court found that the psychiatrist did not state that the drugs found in the victim's bloodstream "would in any way alter her ability to convey truthfulness." The court then concluded that under ***State v. Green***, 2002 WI 68, ¶20, 253 Wis. 2d 356, 646 N.W.2d 298, the defense had not established a sufficient factual basis to justify an in camera inspection of the victim's records.

¶11 Kidd argues that the trial court erred because there was a sufficient factual basis for an in camera inspection of the records. The standard of review for this determination is mixed:

> The defendant bears the burden of making a preliminary evidentiary showing before an in camera review is conducted by the court. [***State v. Shiffra***, 175 Wis. 2d 600, 605, 499 N.W.2d 719 (Ct. App. 1993)]. Factual findings made by the court in its determination are reviewed under the clearly erroneous standard. ***Id.*** Whether the defendant submitted a preliminary evidentiary showing sufficient for an in camera review implicates a defendant's constitutional right to a fair trial and raises a question of law that we review de novo. ***State v. Ballos***, 230 Wis. 2d 495, 500, 602 N.W.2d 117 (Ct. App. 1999); ***State v. Munoz***, 200 Wis. 2d 391, 395, 546 N.W.2d 570 (Ct. App. 1996). If we determine the requisite showing was made, the defendant is

> not automatically entitled to a remand for an in camera review. The defendant still must show the error was not harmless. ***Ballos***, 230 Wis. 2d at 501.

Green, 253 Wis. 2d 356, ¶20 (footnote omitted).

¶12 We agree with the trial court that the evidence of the person who knew the victim was merely speculation. This was a finding of fact by the trial court and we see no reason to upset it. Further, we agree with the trial court's characterization of the expert psychiatrist's testimony. The psychiatrist testified about symptoms that could be caused by the combination of drugs found in the victim's bloodstream, and that these could cause a person to become drowsy, sleepy, or appear intoxicated. The expert further said that these symptoms would be easily noticed and demonstrated by slurred speech, drooping eyes, balance problems, staggering gait, and difficult hand-eye coordination. The defense did not offer any testimony to show that the victim was displaying such symptoms at the time of the sexual assault. The expert also testified about the type of mental conditions these drugs are used to treat, but again offered no evidence that the drugs were being used to treat the victim for these conditions.

¶13 We cannot conclude that the trial court erred in its assessment of the testimony presented. Consequently, we agree with the court's ultimate determination that Kidd did not make the showing necessary for an in camera review of the victim's records.

¶14 The last issue Kidd raises is that the trial court erred when it declined to instruct the jury on fourth-degree sexual assault. The State charged Kidd with second-degree sexual assault. The State requested that the court also instruct the jury on the lesser-included offense of third-degree sexual assault, and the trial court agreed. Kidd then asked that the jury also be instructed on fourth-degree

sexual assault, but the court refused. Kidd argues that fourth-degree sexual assault is a lesser-included offense and the court's refusal to so charge the jury is reversible error. We agree.

¶15 A trial court has wide discretion in giving jury instructions. ***State v. Waites***, 158 Wis. 2d 376, 383, 462 N.W.2d 206 (1990). The trial court applies a two-prong test to determine whether to instruct on a lesser offense. ***State v. Carrington***, 134 Wis. 2d 260, 262 n.1, 397 N.W.2d 484 (1986). The first prong is to determine whether the offense is a lesser-included offense. ***Id.*** The second prong is for the court to determine whether the instruction is justified—that is "whether there is a reasonable basis in the evidence for conviction on the lesser offense and acquittal on the greater offense." ***Id.*** (citation omitted).

¶16 Wisconsin uses the "elements only" test to determine if a crime is a lesser-included offense of another crime. ***Id.*** at 264. Under this test, the lesser offense must be statutorily included in the greater offense. ***Id.*** at 265. "The test focuses not on the particular factual nature of a given defendant's criminal activity, but on whether the lesser offense is statutorily within the greater [offense]…. Stated in other words, an offense is a 'lesser included' one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the 'greater' offense." ***Id.*** (citation omitted). It must be "utterly impossible" to commit the greater offense without committing the lesser. ***Id.*** The court must place the statutes side by side "to interpret the statutes creating the greater and lesser offenses, to differentiate the elements contained therein, and finally to compare those elements." ***Id.*** at 265-66. The question of whether an offense is a lesser-included offense of another is a question of law. *See* ***id.*** at 262.

¶17 Second-degree sexual assault has three elements: (1) the defendant had sexual contact or sexual intercourse with the victim; (2) the victim did not consent to the sexual contact or sexual intercourse; and (3) the defendant had sexual contact or intercourse with the victim by the use or threat of force or violence. WIS JI—CRIMINAL 1208. Fourth-degree sexual assault has two elements: (1) the defendant had sexual contact with the victim; and (2) the victim did not consent. WIS JI—CRIMINAL 1219. The two elements required to be proved for fourth-degree sexual assault are also required to be proved for second-degree sexual assault.

¶18 The State argues that fourth-degree sexual assault can be a lesser-included offense of second-degree sexual assault, but that it is not always a lesser-included offense. The State argues that, in this case, it is not a lesser-included offense because second-degree sexual assault requires proof of either sexual intercourse or sexual contact. In this case, the State continues, the proof was that the defendant performed cunnilingus on the victim, and cunnilingus is sexual intercourse within the statutory definition, WIS. STAT. §§ 939.22(36) and 940.225(5)(c). Sexual contact, the State argues, requires proof of the intent or purpose element. *See* WIS. STAT. §§ 940.255(5)(b)1. and 940.225(5)(b)2. The State further argues that because it could prove second-degree sexual assault by proving intercourse, then fourth-degree sexual assault requires proof of the additional element of intent or purpose, and hence is not a lesser-included offense.

¶19 We are not persuaded by this argument. First, the argument seems to skirt the admonition that the lesser-included offense inquiry does not focus on the particular factual nature of a given defendant's criminal activity. More importantly, however, the State told the jury during opening argument that "this case involves a case of sexual contact and not sexual intercourse." In its closing

argument, the State mentioned both, but then focused on sexual intercourse. Given the State's arguments to the jury, we reject the State's argument to this court that this case involved only sexual intercourse. We therefore also reject the argument that fourth-degree sexual assault in this case required proof of an additional element. Consequently, we conclude that fourth-degree sexual assault is a lesser-included offense of second-degree sexual assault.

¶20 The next prong of the test requires us to determine whether the facts reasonably admit of acquittal on the greater and conviction on the lesser. The State argues that since cunnilingus is sexual intercourse, then the only reasonable verdict is for second-degree sexual assault. We disagree. As Kidd argues, cunnilingus can also be sexual contact under the definition in WIS. STAT. § 940.225(5)(b). The State attempts to distinguish this argument by looking to the fourth-degree sexual assault statute. We are not persuaded by this argument because the fact remains that the State decided to charge sexual contact as one of the bases for second-degree sexual assault. Because the State charged sexual contact, we cannot accept its argument that sexual contact was not part of the second-degree sexual assault case. For these reasons, we reverse the judgment of conviction and remand the matter to the circuit court for a new trial consistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.